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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-429

IDAS B. WHITE,
Petitioner,

v.

HARRINGTON MANUFACTURING CO., INC.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

JOHN S. HALE
SIMOR L. MOSKOWITZ
FLEIT, GIPPLE & JACOBSON
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

HARVEY B. JACOBSON, JR.
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

MARION B. KNIGHT
201-205 Ramsey Building
P. O. Box 375
Blountstown, Florida 03242

September 5, 1973

BEACON PRINTING - 293-7160 - Washington, D.C. 20036

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IN THE

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No.

IDAS B. WHITE,
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v.

HARRINGTON MANUFACTURING CO., INC.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, IDAS B. WHITE, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on March 13, 1973.

OPINIONS BELOW

The opinion of the U.S. District Court for the Northern District of Florida, Tallahassee Division (Appendix A, *infra*, pp. 1a-17a is reported at 323 F. Supp. 1345. The opinion of the United States Court of Appeals for the Fifth Circuit

(Appendix B, *infra*, pp. 18a - 46a) is reported at 475 F.2d 788.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*, p. 47a) reversing the District Court was entered on March 13, 1973. A Petition for Rehearing, timely filed, was denied on June 7, 1973 (Appendix D, *infra* pp. 48a - 49a). This Court's jurisdiction is involked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

Whether §112 of the Patent Statute (Title 35) sanctions functional language at the precise point of novelty in a combination patent claim; and, if so, can the ordinary and accustomed meaning of the functional language be disregarded and ignored?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Article I, §8, Clause 10.

> The Congress shall have Power . . .
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . .

Statutes:

35 U.S.C. § 112.

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the

same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention. A claim may be written in independent or dependent form, and if in dependent form, it shall be construed to include all the limitations of the claim incorporated by reference into the dependent claim.

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

STATEMENT OF THE CASE

This patent infringement lawsuit is based upon U.S. Patent No. 3,327,745, issued June 27, 1967 (the Meece-Dew patent, Appendix E, *infra*, pp. 50a-60a) for a tree cutter device.

In 1965, Fred W. Meece and Frank B. Dew, designed and built a tree cutter device for mounting on a tractor or other vehicle. The device can be readily understood from the Meece-Dew patent drawings. (Appendix E, *infra*, pp. 50a - 52a) It included what was then a conventional hydraulically operated "shear head" or "cutter head" which operated in a manner very similar to the conventional garden snipper, except that it was hydraulically operated. The shear head consisted of a fixed jaw 3, which would press against the backside of the tree, a blade 7 to do the actual cutting, and one or more double acting hydraulic cylinders 10 to close the blade during cutting and to retract the blade after the cutting stroke. Meece and Dew then employed a conventional type "C-frame" by which the shear head could be attached to the tractor. The C-frame consisted of a pair of parallel arms 15

and 15' pivotally mounted on each side of the tractor 1 and a horizontal beam 14 welded across the front of the parallel arms. The C-frame and horizontal beam were raised and lowered by conventional means.

Meece and Dew then attached the shear head to the horizontal beam of the C-frame by means of several pivotal connections 13 which allowed the shear head to be angularly adjusted with respect to the C-frame as desired. In order to support the shear head in the desired angular position with respect to the C-frame, Meece and Dew adopted a flexible interconnection, such as cable and bar link 22 and 23 (Figs. 1-4) or chain 22' (Figs. 6-8) between the C-frame and the shear head. By means of this arrangement, the flexible interconnection served the functions of establishing "the maximum arc through which the jaw members can *freely move* with respect to the beam 14" (emphasis ours) (Meece-Dew patent, column 3, lines 54-61; Appendix E, *infra*, p. 56a) and of providing some "give" to the shear head. As regards this latter function, the Meece-Dew patent states (column 4, lines 42-51; Appendix E, *infra*, p. 58a):

> If the jaws and blade were not pivotally *and flexibly interconnected* as we have described above, the force of the descending trunk could easily break the blade and/or jaws. Our arrangement provides some "give" so that even if the severed trunk slams down on the jaws and blade, this force is largely transmitted to or absorbed by the ground upon which the jaws and blade are resting by virtue of the pivotal connection to the beam 14 and the flexible interconnection means. (Emphasis ours)

Idas B. White[1] designed and built his first hydraulically operated tree shear in the spring of 1966, without knowledge of the Meece-Dew machine. White was a machine shop owner who had been designing and building mechanical equipment

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[1]Petitioner in this case and hereinafter referred to as "White".

for more than thirty years. Like the Meece-Dew machine, the White tree shear also included a conventional shear head which was pivotally mounted on the tractor C-frame. However, while White experimented with a standard flexible element as his support interconnection between the shear head and C-frame, White found upon field testing that a flexible type interconnection was unsatisfactory for his machine. Accordingly, White adopted a rigid interconnection in the form of a double acting hydraulic cylinder which locks in any adjusted position. White discovered that by using a double acting hydraulic cylinder not only could his tree shear be operated totally from the vehicle cab, but also the power actuation of the double acting hydraulic cylinder in the downward direction would serve to crush any heavy brush, snow, etc., which might surround the tree at the time it is to be cut. Hence, the lowest possible cutting position is achieved.

White also equipped his tree shear with what he called "toter brackets" which were welded onto the horizontal beam of the C-frame and engaged the shear head before the double acting hydraulic cylinder reached its furthest extension. Thus, the "toter brackets" limited the downwardmost pivotal position of the shear head. The "toter brackets" served, first, to insure that the shear head be locked when in a downwardmost position by reason of the downward force applied by the double acting cylinder to the shear head against the brackets and, second, to provide a safety feature in that the weight of the shear head is carried by the brackets rather than the double acting hydraulic cylinder. (District Court Finding 15, Appendix A, infra, p. 6a)

The rights to the Meece-Dew machine were purchased in early 1966 by Harrington Manufacturing Co., Inc.,[2] a manufacturer of farm and related equipment. However, Harrington did not file its application for the Meece-Dew patent until

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[2]Harrington Manufacturing Co., Inc., was plaintiff-appellant below and is hereinafter referred to as "Harrington".

October 5, 1966, approximately 40 days *after* Harrington personnel had seen, inspected and photographed the White tree shear. (District Court Finding 17; Appendix A, *infra*, p. 7a)

The issue on this petition centers around the language selected by Harrington's patent solicitors to claim the support interconnection between the "shear head" and the "C-frame." This interconnection is described in claim 1, subsection (f), as follows:

> (f) *flexible* interconnection means interconnected between the said two generally parallel supporting arms and said pair of fixed jaw members *which serves to limit the pivotal arc through which the fixed jaw members can pivot.* (Emphasis ours)

In claim 2, the interconnection is described in subsection (d) as follows:

> (d) . . . , and said fixed jaw members being additionally connected to said elongated horizontally disposed beam by *flexible* interconnection means *so that said fixed jaw members are free to move through a limited pivotal arc.* (Emphasis ours)

While upholding the validity of the Meece-Dew patent claims, the District Court first concluded that the word "flexible" should be interpreted in accordance with its ordinary and accustomed meaning. (District Court Conclusion 22; Appendix A, *infra,* p. 14a) Hence, the support interconnection of the patented combination must be of the conventionally flexible type, such as a chain or cable, and cannot include a rigid type interconnection, such as a steel bar with adjustment holes or a rigid double acting hydraulic cylinder of the type used in the White tree shear. (District Court Conclusion 22; Appendix A, *infra,* p. 14a)

Second, the District Court interpreted the functional language from the above quoted Meece-Dew patent claims to require the flexible support interconnection to serve two

functions, to-wit: (1) permit free pivotal movement of the shear head and (2) limit the downwardmost position of the arc through which the shear head could move. (District Court Finding 7; Appendix A, *infra*, pp. 4a - 5a) Since the "toter brackets" of the White tree shear interrupted any free pivotal movement of the shear head and served to limit the downwardmost position of the arc through which the shear head could move rather than the interconnection itself, the District Court also found that the White tree shear did not infringe because White's double acting hydraulic cylinder did not perform the functions required by the Meece-Dew patent claims. Accordingly, the District Court dismissed the complaint. Harrington appealed to the Court of Appeals.

The Fifth Circuit affirmed the District Court's holding of patent validity, but disagreed with the District Court's interpretation of the quoted functional recitations of the Meece-Dew patent claims.[3] The Court of Appeals concluded that angular adjustment of the shear head was the "basic concept" of the Meece-Dew tree shear.[4] (Appendix B, *infra*, pp. 23a, 38a, 39a, 43a) Hence, the phrase "flexible interconnection means" was construed to encompass any "means [which] could accomplish the end, i.e., variance of the angle of the cutting head." (Appendix B, *infra*, pp. 38a -39a) The Court of Appeals' election to ignore the word "flexible" in the patent claims was passed over as "Lexicographic License" with only the notation that "*adjustable* interconnection means" would have been a more appropriate phrase. (Appendix B, *infra*, pp. 38a - 39a) Furthermore, the Court of Appeals effectively ignored the

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[3]No question of fact is raised by this petition. The Court of Appeals was careful to point out that its decision was based upon a construction of the Meece-Dew patent claims and not a reversal of the correctness of the lower court's findings of fact. (Appendix B, *infra*, p. 33a)

[4]In fact, the Court of Appeals referred to the angular adjustability of the shear head in the Meece-Dew tree shear no less than nine times.

two functional requirements for the "flexible interconnection means" set forth in the Meece-Dew patent claims which were considered by the District Court. Accordingly, the Court of Appeals reversed the finding of non-infringement.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Prior Decisions of This Court and Demonstrates How The Use of Functional Limitations in Patent Claims at the Precise Point of Novelty Tends to Defeat the Constitutional Mandate for the Patent Laws to Promote the Progress of Science.

Vague and indefinite patent claims were denounced by this Court very early in our history. *Evans v. Eaton*, 7 Wheat. 356, 432-435, 5 L.Ed. 472, 491-492 (1822); *Merrill v. Yeomans*, 94 U.S. 568, 573-574, 24 L.Ed. 235, 236-237 (1877). In *Gill v. Wells*, 89 U.S. 1, 25-26, 22 L.Ed. 699, 710 (1874), this Court enumerated the three great ends intended to be accomplished by the Patent Act:

> (1) That the Government may know what they have granted and what will become public property when the term of the monopoly expires. (2) That the licensed persons desiring to practice the invention may know, during the term, how to make, construct and use the invention. (3) That other inventors may know what part of the field of invention is unoccupied.

These three great ends are the foundation of the Congressional power to issue a patent. *Grant v. Raymond*, 6 Pet. 218, 247, 8 L.Ed. 376, 386 (1832); *Winans v. Denmead*, 15 How. 330, 347, 14 L.Ed. 717, 724 (1853). As more recently stated by this Court in *Permutit Co. v. Graver Corp.*, 284 U.S. 52, 60, 76 L.Ed. 163, 167 (1931):

> The [patent] statute requires the patentee not only to explain the principle of his apparatus and

> to describe it in such terms that any person skilled in the arts to which it appertains may construct and use it after the expiration of the patent, but also to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.

Following and quoting the above principle, this Court in *General Electric Co. v. Wabash Appliance Co.*, 304 U.S. 364, 371-372, 82 L.Ed. 1402, 1407 (1938), invalidated a patent because the claims used "conveniently functional language at the exact point of novelty" and thereby failed to reasonably inform the public of the limits of the patent monopoly.

While the use of "means plus function" terminology in patent claims directed to mechanical combinations, such as the "flexible interconnection means" and attendant functions recited in the Meece-Dew patent claims, was sanctioned by this Court's decision in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 52 L.Ed. 1122 (1908), this Court, following the *General Electric* decision, concluded in 1946 that patent claims utilizing "means plus function" terminology at the precise point of novelty fail to comply with the requirement that the patentee "particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery." *Halliburton Oil Wells Cementing Co. v. Walker*, 329 U.S. 1, 12, 91 L.Ed. 3, 11 (1946). The danger perceived in *Halliburton* was that a "means plus function" recitation at the precise point of novelty framed the novel feature of the patent in terms of functional results and, hence, might sweep within the patent's scope future technological developments by others. As such, inventive genius might be frightened from the course of experimentation and thus defeat the ends to be accomplished according to the Constitutional mandate.

The evils inherent in functional claim language are clearly demonstrated by the Court of Appeals decision below. Based upon its interpretation of the Meece-Dew basic concept, the Court of Appeals concluded that any support interconnection between the shear head and C-frame which accomplishes the end of varying the angle of the cutting head satisfies the pertinent functional limitation of the patent claims. This interpretation of the critical language of the claims not only sweeps aside the only structurally limiting word of the prescribed interconnection, to wit: "flexible", but also ignores the functional requisites for the interconnection specifically set out in the claims themselves. In other words, according to the claim language itself, the interconnection must both permit free pivotal movement of the shear head and serve to limit the downwardmost position of the arc through which the shear head can move. Both of these functional requirements of the Meece-Dew patent claims are separate and apart from the angular adjustability found so basic by the Court of Appeals.

Since the Court of Appeals acknowledged that the double acting hydraulic cylinder of the White tree shear possessed attributes not heretofore claimed by Meece and Dew, e.g., that the force of the cylinder could be used to crush brush, snow, or other debris at the base of the tree in order to cut the tree at the lowest possible point (Appendix B, *infra,* pp. 41a - 42a), this case is a classic example of the danger proscribed by the rationale of the *Halliburton, General Electric* and earlier decisions. By giving the functional language of a patent claim a meaning which ignores the words used by the patentee and totally disregards the functions specified in the claims, the public cannot be apprised of the finite limits of the patent's scope. As such, efforts to develop alternate or improved components, such as White's double acting hydraulic cylinder, would be restricted as a result of the ambiguity of

the patent.[5] *Merrill v. Yeomans,* 94 U.S. 568, 573, 24 L.Ed. 235, 236 (1877); *Permutit Co. v. Graver Corp., supra*; *Halliburton Oil Wells Cementing Co. v. Walker, supra.*

Respondent will undoubtedly argue that when §112 was enacted as part of the Patent Law Codification in 1952 under Title 35, the *Halliburton* decision was overruled. When §112 was enacted, the major changes over its predecessor were (1) the provision in a separate paragraph of the requirement for "particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention" in order to emphasize the distinction between the descriptive portion of the specification and the claims which measure the scope of the invention and (2) the addition of the new third paragraph relating to functional claim language. The legislative history with respect to the enactment of the 1952 Patent Act furnishes very little assistance in interpreting the intent and scope of the new third paragraph of §112 and its relationship to the requirement in the second paragraph that the claims particularly point out and distinctly claim the patent subject matter. In the House of Representatives, the Patent Act after being read three times (98 Cong. Record, Part 4, pp. 54, 55 - 82nd Cong., 2nd Sess. 1952), took 30 seconds to pass without substantive comment being made (98 Cong. Record, Part 7, p. 9323 - 82nd Cong., 2nd Sess. 1952). In the Senate, barely more comment was made. Chief comments were to the effect that the bill codified existing patent law, and that it passed the House and was approved by the Judiciary Committee of the Senate. (See 98 Cong. Record, Part 7, pp. 9097 and 9756 - 82nd Cong., 2nd Sess. 1952.) While the Commentary on the New Patent

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[5]It is worthy of note that when White presented his improved design to the Patent Office, he was granted a patent, No. 3,382,899, over the Meece-Dew structure. Furthermore, when faced with competition from the White tree shear, Harrington adopted White's double acting hydraulic cylinder as its support interconnection.

Act, written by P.J. Federico, the then Examiner-in-Chief of the U.S. Patent Office, indicates that the last paragraph of §112 did modify or render obsolete decisions such as that in the *Halliburton* case, Mr. Federico was also careful to point out that the exact limits on the use of functional expressions in combination claims " remain to be determined." (35 U.S.C.A., pp. 24-25)[6]

In any event, §112 did not sanction the total disregard which the Court of Appeals applied to the "means plus function" language of the Meece-Dew patent claims. Hence, this case is an appropriate vehicle for this Court to determine the exact limits by which the third paragraph of §112 altered, if at all, the requirements set down by this Court in the *Halliburton* case for patent claims to particularly point out and distinctly claim the patented invention.

2. In View of the Importance and Widespread Use of "Means Plus Function" Terminology in Patent Claims, the Time has Come for This Court to Furnish Its Guidance to the Lower Courts as to the Proper Limits of This Terminology in Light of §112.

The use of "means plus function" terminology in patent claims directed to combinations is now widespread. It is estimated that far in excess of fifty percent of all patents now granted by the U.S. Patent Office in the mechanical and electrical arts contain claims having "means plus function" recitations. A review of a random sample of five

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[6]See, also, Statement of T. Hayward Brown, Department of Justice, Hearings on H.R. 3760 Before the Subcomm. on Patents, Trademarks and Copyrights No. 3 of the House Comm. on the Judiciary, 82nd Cong., 1st Sess., Section 9 at 95 (1951):

> This section may substantially alter existing law. At present the courts will invalidate a single "means" claim when it is functional; that is, when it covers all means for performing an act, or when the step described as a "means" is the precise point of invention. The burden at present is upon the patentee to describe his invention in exact terms and it is not clear to what extent he might be relieved of this duty under the proposed section.

hundred patents, i.e., numbers 3,735,000 to 3,735,500, inclusive, revealed that 276, or about 55%,[7] include "means plus function" recitations in the claims.

Since enactment of the 1952 Patent Act, this Court has reviewed all of the important sections of the Patent Statute, except §112. These include the requirements for "utility" specified in 35 U.S.C. §101 and "invention" specified in §102 and new §103,[8] and infringement defined in §271.[9] [10] However, this Court has not yet spoken out on §112, and, in particular, its effect on "means plus function" terminology in patent claims.

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[7]This percentage figure is based on the total 500 patents examined which included a number of chemical patents that would not be expected to contain "means plus function" recitations.

[8]Graham v. John Deere Co., 383 U.S. 1, 15 L.Ed.2d 545 (1966); United States v. Adams, 383 U.S. 39, 15 L.Ed.2d 572 (1966); Anderson's-Black Rock v. Pavement Salvage Co., 396 U.S. 57, 24 L.Ed.2d 258 (1969); Brenner v. Manson, 383 U.S. 519, 16 L.Ed.2d 69 (1966); Hazeltine Research Inc. v. Brenner, 382 U.S. 252, 15 L.Ed.2d 304 (1965).

[9]Aro Manufacturing Co., v. Convertible Replacement Top Co., 365 U.S. 336, 5 L.Ed.2d 592 (1961), modified, 377 U.S. 476, 12 L.Ed.2d 457 (1964); Wilbur-Ellis v. Kuther, 377 U.S. 422, 12 L.Ed.2d 419 (1964); Laitram Co. v. Deepsouth Packing Co., 406 U.S. 518, 32 L.Ed.2d 273 (1972).

[10]In addition to reviewing the requisites under 35 U.S.C. §101, 102, 103 and 271, this Court has also considered the right of a patent agent to practice before the Patent Office without being admitted to the practice of law, Sperry v. Florida, 373 U.S. 379, 10 L.Ed.2d 428 (1963); the paramount nature of the Federal Patent Law in relation to the unfair competition laws of the several states, Sears v. Stiffel, 376 U.S. 225, 11 L.Ed.2d 661 (1964); the patentability of general purpose computer programs under 35 U.S.C. §100(d), Gottschalk v. Benson, ___ U.S. ___, 34 L.Ed.2d 273 (1972); the right of a party charged with infringement to assert collateral estoppel against a patentee whose patent was held invalid by a prior adjudication, Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 28 L.Ed.2d 788(1971); and the propriety of the patent licensee estoppel doctrine, Lear v. Adkins, 395 U.S. 653, 23 L.Ed.2d 610 (1968).

In view of the overwhelming tendency of patentees to include "means plus function" terminology in claims directed to mechanical and electrical combinations, and the fact that §112 was enacted after this Court last considered the requirements for distinct claiming in the *Halliburton* case in 1946, the need for this Court to furnish guidance in dealing with "means plus function" claim language is urgent.

3. The Decision Below Is Inconsistent With Prior Decisions of the Appellate Courts.

The Court of Customs and Patent Appeals, which has had the most occasion to deal with §112, determined from the outset that the specificity requirements of the first and second paragraphs of §112 are explicit and mandatory and have not at all been diminished by the addition of the third paragraph. The CCPA concluded that the third paragraph must be read in light of the requirement stated in the second paragraph that claims particularly point out and distinctly claim the alleged invention, and the third paragraph must be given an interpretation consistent therewith. *Application of Arbeit*, 206 F.2d 947, 955-958 (CCPA 1953); *Application of Lundberg*, 244 F.2d 543 (CCPA 1957); *Application of Henatsch*, 298 F.2d 954 (CCPA 1962). In *Application of Lundberg, supra*, the CCPA concluded:

> We are of the opinion, therefore, that, notwithstanding the third paragraph of section 112, it is the language itself of the claims which must particularly point out and distinctly claim the subject matter which the applicant regards as his invention, without limitations imported from the specification,.... Limitations in the specification not included in the claim may not be relied upon to impart patentability to an otherwise unpatentable claim. (at 244 F.2d 549)

It is obvious that the court below rewrote the Meece-Dew patent claims to conform with the court's version of the Meece-Dew shears' "raison d'etre." (Appendix B, *infra*, pp.

23a) But, it was precisely such a broad analysis imported from a patent specification for interpreting "means plus function" terminology which the CCPA condemned in the *Lundberg* decision.

Similar problems arise in trying to reconcile the decision below with prior opinions of other Courts of Appeal. The prior appellate decisions which have sustained patent claims containing "means plus function" terminology have done so only by narrowing the functional "means" recitation to the qualifying structural components disclosed in the drawings and specification. See, for example, *Stearns v. Tinker and Razor,* 252 F.2d 589 (9th Cir. 1957) cert. denied 350 U.S. 830 (1955); *Delfrancia v. Stanthony Corp.,* 278 F.2d 745 (9th Cir. 1960); *Foster Cathead Co. v. Hasha,* 382 F.2d 761 (5th Cir. 1967), cert denied 390 U.S. 906 (1968); *Locklin v. Switzer Bros., Inc.,* 299 F.2d 160 (9th Cir. 1961), cert. denied 369 U.S. 861 (1962). However, the Fifth Circuit did not do so in this case. Rather, the Meece-Dew "flexible interconnection means" was held to encompass any interconnection which permits angular adjustability of the shear head, including many of the interconnections disclosed in the prior art. Review by this Court would avoid conflict in the application of §112 by the lower courts.

4. The Decision Below Is Contrary to the Long Standing Doctrine and Applicable Decisions of This Court that a Patent Specification May Not Be Used to Enlarge the Scope of Patent Claims.

It is axiomatic in the Patent Law that while the specification and drawings of a patent may be utilized to limit the scope of patent claims, they can never be relied upon to enlarge the scope of the patent claims. *McClain v. Ortmayer,* 141 U.S. 419, 423-424, 35 L.Ed. 800, 802 (1891); *Lehigh Valley R.R. Co. v. Mellon,* 104 U.S. 112, 118, 26 L.Ed. 639, 641-642 (1881); *United States v. Adams,* 383 U.S. 39, 48-49, 15 L.Ed.2d 572, 578-579 (1966). As stated in *McClain v. Ortmayer, supra*:

Nothing is better settled in the law of patents

> than that the patentee may claim the whole or only a part of his invention, and that if he only describe and claim a part, he is presumed to have abandoned the residue to the public. The object of the patent law in requiring the patentee to "particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery," is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them. The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it.

The court below overlooked this principle and proceeded on the basis of the Meece-Dew patent specification to enlarge the scope of the patent claims to cover any interconnection which allowed "angular adjustability" of the shear head irrespective of shape, operation or function. Hence, the Meece-Dew patent claims, as interpreted by the Fifth Circuit, include within their scope both conventionally flexible and conventionally rigid interconnections. Similarly, the claims contemplate both support interconnections which permit free movement of the shear head and determine the downwardmost position of the shear head and those which do not. The only criterion is "angular adjustability."

By rewriting the Meece-Dew patent claims beyond their proper limits, the Court of Appeals not only has broadened the Meece-Dew patent claims without providing the public

with the protection afforded by the reissue statute,[11] but also has fostered ambiguity in the drafting of patent claims. Such blatant conflict with well established principles should not be permitted without review by this Court.

CONCLUSION

The decision below is in conflict with prior decisions of this Court and brings into focus the effect of the new third paragraph of §112 on the Constitutional mandate for the Patent Laws to promote the progress of science. By enlarging the scope of patent claims beyond the specific language appearing therein, the court below raises an

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[11] 35 U.S.C. §252, provides in part:

> No reissued patent shall abridge or affect the right of any person or his successors in business who made, purchased or used prior to the grant of a reissue anything patented by the reissued patent, to continue the use of, or to sell to others to be used or sold, the specific thing so made, purchased or used, unless the making, using or selling of such thing infringes a valid claim of the reissued patent which was in the original patent.

important question of patent claim interpretation having far reaching significance in present practice which should be reviewed by this Court.

The Petition for Certiorari should be granted.

Respectfully Submitted,

HARVEY B. JACOBSON, JR.
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

MARION B. KNIGHT
201-205 Ramsey Building
P. O. Box 375
Blountstown, Florida 03242

Counsel for Petitioner

Of Counsel:

JOHN S. HALE
SIMOR L. MOSKOWISZ
FLEIT, GIPPLE & JACOBSON
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

September 5, 1973